IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Civil Action No. 95-1211 (RCL)
v.	)	Judge Royce C. Lamberth
AMERICAN BAR ASSOCIATION,	)	
Defendant.	)	

UNITED STATES' REPLY TO MOTION AND BRIEF OF
AMICUS CURIAE, THE MASSACHUSETTS SCHOOL OF LAW

The United States submits this short reply to the motion and brief filed by the amicus curiae, Massachusetts School of Law ("MSL").[1] MSL raised almost all of the same points in its lengthy comment and the United States has responded in detail to that comment, see United States' Response To Public Comments About Proposed Modification Of Final Judgment at 11-20 (filed Nov. 20, 2000). Accordingly, we will reply briefly only to a few issues.

The Final Judgment, as the parties jointly seek to modify it, is clearly within the "zone of settlements consonant with the public interest today," and, thus, the Court should approve the

[1] The United States does not oppose MSL's motion to file this brief. Nonetheless, much of it goes beyond the proper role of an amicus brief, raising irrelevant issues that are not presently before the Court. "An amicus cannot initiate, create, extend or enlarge issues." Waste Management of Pennsylvania, Inc. v. City of New York, 162 F.R.D. 34, 36 (M.D. Pa. 1995); see also United States v. Hinckley, 725 F. Supp. 616, 625 (D.D.C. 1989) (amici's role is limited to illuminating "the issues before the Court, not adding positions which advocate amici's own, non-party interests").

The Government is filing this reply brief based on a fax of MSL's brief without appendix. We have not yet received the hard copy of the brief and the appendix. Nonetheless, so that this brief is timely under LCvR 5.3(d), we file it today.

modification. United States v. Western Electric Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993); see also United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995). The proposed Modification is necessary to conform the Final Judgment to requirements that an accrediting agency recognized by the Department of Education ("DOE") be "separate and independent" from the affiliated trade association, as mandated by the Higher Education Act ("HEA"), 20 U.S.C. § 1099b, and the regulations thereunder. See United States' Response To Public Comments at 7-10; United States' Memorandum In Support Of The Joint Motion For Modification Of The Final Judgment at 5-7 (filed April 3, 2000). Indeed, MSL acknowledges in its amicus brief that the separate and independent requirement prevents placing final decision-making authority in the ABA's House of Delegates. See Brief Of Amicus Curiae at 10-12 (filed Dec. 4, 2000).[2]

MSL also argues that the free-standing law schools could obtain regional accreditation if the ABA was no longer recognized as a DOE-accrediting agency. As we said in the Response To Public Comments, no third party has the right to require that a modification be rejected and replaced with another because, in its view, the substitute would better serve society. Id. at 25. Furthermore, DOE has explained that obtaining regional accreditation would be time consuming

[2] MSL repeatedly contends that DOE knew or should have known when the decree was entered that it did not conform to the separate and independent requirement. As we explained in the Response To Public Comments, DOE did not realize that the decree was intended to subject Standards, Interpretations, and Rules to House of Delegates' review, and thus, was not in conformity with the separate and independent requirement. Id. at 18, n.14. In any event, the issue of whether DOE knew or should have known that the decree did not conform is irrelevant. The only issue before the Court is whether the Judgment as modified meets the "zone" of public interest test articulated in Western Electric. The decree does not conform to the separate and independent requirement, and, thus, modification is necessary and in the public interest.

Moreover, this proceeding is not the proper forum under the Administrative Procedures Act to challenge DOE's determination that the ABA does not fulfill the separate and independent requirement or qualify for a waiver of it. See United States' Response To Public Comments at 23-24.

for the independent law schools, likely taking months. Forcing the free-standing schools to obtain regional accreditation would require them to bear significant additional costs. In addition to obtaining regional accreditation, almost all of these schools would continue to obtain the ABA accreditation that most state supreme courts require as a condition for admission to the state bar. Hence, the schools will bear the costs of both ABA accreditation and regional accreditation. Moreover, removing DOE-recognition means the ABA process would not be subject to DOE oversight. DOE oversight is important to ensure that each accrediting agency is a reliable authority as to the quality of education at its member institutions.

Finally, in large part, MSL's amicus brief is an attack on the entry of the Final Judgment by this Court in 1996 and on the Department of Justice for failing to bring a broader case against the ABA. MSL again attacks the Special Commission required by the Judgment, condemns the Judgment's oversight provisions, and criticizes other portions of the Judgment for not remedying MSL's concerns. Indeed, MSL devotes much of its brief to attacking the ABA accreditation process in general, raising issues that were not challenged in the Complaint as antitrust violations (e.g., ABA Standards dealing with the LSAT and law library collections and allegations that the ABA acts to limit the types of students who can enter the legal profession). These arguments were not only raised by MSL in lengthy filings before entry of the Final Judgment, but are irrelevant to the Court's determination here. The only issue before the Court is the modification of the Final Judgment to conform to the HEA, as DOE has required. This not a forum for MSL, having twice lost cases it filed challenging the ABA's denial of accreditation,[3] to relitigate its

[3] See Massachusetts School of Law v. American Bar Ass'n, 937 F. Supp. 435 (E.D. Pa. 1996), aff'd, 107 F.3d 1026 (3rd Cir. 1997); Massachusetts School of Law v. American Bar Ass'n, No. 95-CV-12320-MEL, 1997 WL 263732, 1997 U.S. Dist. LEXIS 7033, (D. Mass. May 8, 1997), aff'd,

claims, or to force the Justice Department to do so on its behalf. Taken as a whole, the remedies in the Final Judgment, as the parties propose to modify it, address the violations alleged in the Complaint. Accordingly, the Final Judgment as modified, is clearly within the zone of settlements consistent with the public interest, for the reasons stated in the United States' Response To Public Comments and Memorandum In Support Of The Joint Motion For Modification. Thus, the Court should enter the proposed Modification To Final Judgment.

Dated: DECEMBER 11, 2000

Respectfully submitted,

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142 F.3d 26 (1st Cir. 1998).

CERTIFICATE OF SERVICE

On December 11, 2000, I caused a copy of the United States' Reply To Brief Of Amicus Curiae to be served upon:

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